

New England Environmental Streamlining Group

Introduction:

The Transportation Equity Act for the 21st Century (TEA-21), enacted by the U.S. Congress on June 9, 1998, contained a provision on environmental streamlining for Federally funded transportation projects. Section 309 of the act requires the development and implementation of a coordinated environmental review process that provides for concurrent processing of all environmental reviews and analyses by Federal agencies for projects. It also emphasizes cooperative determination of time periods for completion of the reviews. Federal agencies that would be involved in addition to the Department of Transportation (DOT) are those with jurisdiction by law over environmental resources that may be affected by the project. These agencies also include those that may be required by Federal law to independently conduct an environmental related review or determine whether to issue a permit or render an opinion on the environmental impact of the project. The act addresses dispute resolution and the DOT's ability to provide funds to affected Federal agencies to obtain the resources necessary to meet any time limits established under the coordinated review process. The Federal Highway Administration (FHWA) has been pursuing development of environmental streamlining processes both at the National and regional levels.

Status of New England Efforts:

The New England states located within the boundaries of the Environmental Protection Agency Region I (TEA-21 eliminated FHWA regions) have met twice in Cambridge MA to address common issues on environmental streamlining. The first meeting was on December 14 and 15, 1999, and the second was on March 7, 2000. Representatives from State and Federal transportation, resource, and regulatory agencies from the six states -- Massachusetts, Maine, Connecticut, Vermont, New Hampshire, and Rhode Island -- identified approximately 22 issues that needed to be addressed. During facilitated sessions, these topics were pared down to the top five. These topics were: [early identification of stakeholders](#); [consistent interpretation of regulations](#); [better scoping in project planning](#); [better definition under Section 106 of the National Historic Preservation Act](#); and [timely dispute resolution](#). Work groups were formed to address the environmental streamlining implications of these issues, and to develop action plans. These action plans are reproduced as follows:

Action Plan #1: Early Identification and Engagement of Stakeholders

(March 7, 2000)

Problem Statement:

The inadequacy of early identification and continual engagement of all stakeholders [including the public, Metropolitan Planning Organizations (MPO), resource and regulatory agencies, and Section 106 consulting parties] results in:

- Issues and concerns not being fully identified to all parties (including the State DOTs and US DOT) and considered in the planning and project development process;
- Overall inefficiency and conflicts in the project development process; and,
- Difficulty for stakeholders to identify and balance priorities and resources.

Action Plan:

- Expand interagency work group membership by adding representatives from the following parties: natural resource/regulatory agency, State DOT (minimum one), local DOT (minimum one), Federal Highway Administration Division Office (minimum one), MPO, and transit operator.
- Provide for sharing of best practices related to early identification of stakeholders and their sustained involvement in transportation project development. Potential work products could include: guidance papers, web-based databases, CD-ROM, and other information sharing mechanisms. The goal of the outreach and education process would be to make stakeholders aware of the importance of their early involvement in the transportation planning process and to allow for better balancing of resources, thereby minimizing potential conflict.
- Identify training needs among all parties and develop and/or recommend delivery options, maximizing available training resources.

Schedule:

Expansion of interagency work group: April 2000

Explore partnering possibilities with other streamlining efforts: April - June 2000

Prepare draft best practices material: September 2000

Review and comment on draft best practices material by New England Work Group: October 2000

Release final best practices material: November 2000

Identify training needs and delivery options: September 2000

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Action Plan #2: Consistent Interpretation of Regulations (March 31, 2000)

Action Plan:

- Formation of a Regional Subcommittee for the development of a uniform process which all Federal permitting and funding agencies deem acceptable to satisfy the requirements of National Environmental Policy Act (NEPA), Section 106 of the National Historic Preservation Act, Section 404 of the Clean Water Act, and Section 4(f) of the DOT Act of 1966.
- Conduct a survey with each State DOT to find out instances where there are inconsistent interpretation of regulations by decision making Federal agencies.
- Summarize inconsistencies or areas of commonality with respect to implementing the procedures of NEPA, Section 106, Section 404, and Section 4(f).
- Provide recommendations in the form of Memorandum of Agreements, policy revisions, and/or regulatory changes to facilitate streamlining the environmental process so as to allow, where possible, one NEPA or other environmental related process document prepared by the designated lead agency to satisfy the requirements of all Federal permitting and funding agencies.

Resources:

FHWA Division Offices in New England - one representative each

United States Coast Guard First District - one representative

Federal Transit Administration Region One - one representative

Army Corps of Engineers New England District - two representatives

Environmental Protection Agency Region One - one representative

State DOTs in New England - one representative each

FHWA Eastern Resource Center - one representative

Timeline:

Formation of committee: April through May, 2000

Survey each State DOT: June through August, 2000

Summarize inconsistencies: September, 2000

Review and comment: October, 2000

Final Recommendations: November, 2000

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Action Plan #3: Draft Better Scoping Action Plan (March 30, 2000)

Actions to be completed by work group:

Action 1: Compile and summarize information from each New England DOT/FHWA office regarding existing scoping procedures.

Action 2: Identify stakeholders who should be involved in efforts to improve scoping for transportation projects.

Action 3: Develop a stakeholder survey concerning scoping (this may include sharing the results of our analysis of what the six New England states are doing).

Action 4: Survey identified stakeholders.

Action 5: Record responses, compile results, and distribute results to each team member.

Action 6: Analyze responses and discuss within work group setting.

Action 7: Present results to stakeholders (from Action 1) for review and input on how the results should be implemented on a regional or state by state basis.

Action 8: Summarize stakeholder feedback.

Action 9: Work group follow up meeting to discuss stakeholder feedback and develop a course of action to improve scoping.

Action 10: Work group to describe the results of the analysis to the TEA-21 group at large including presentation of a recommendation.

Timeline:

Develop summary of existing scoping procedures for six New England states: mid-May

Identify stakeholders, develop and implement survey, compile results: late-July

Discuss results and present to stakeholders for comment: mid-September

Work group follow-up meeting to develop course of action: mid-October

Presentation of work group results to group at large: mid-December

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Action Plan #4: Better Definition Under Section 106 of the National Historic Preservation Act (March 31, 2000)

Problem Statement:

Lack of agency guidance has led to inconsistent application of 106 regulations and oversight leading to poor cooperation and potential for abuse of the process and litigation.

Action Items:

- [Develop agency guidance](#)
- [Pursue alternate procedures](#)
- [Explore funding Advisory Council of Historic Preservation \(ACHP\) for FHWA work](#)
- [Develop programmatic agreements \(both nationally and locally\)](#)
- [Establish qualified 106 personnel at resource centers](#)
- [Develop NHI sponsored 106 training course](#)

Develop Agency Guidance -- The new Section 106 regulations were published in the Federal Register on May 18, 1999, and went into effect on June 17, 1999. The new regulations replace the existing regulations and changes some requirements and add new requirements that Federal agencies must ensure are met in carrying out their undertakings. The regulations identified in 36 CFR 800 are written for all Federal agencies, therefore, the procedures are general in nature. The ACHP has been very good about providing general guidance about the Section 106 process, but the FHWA should provide some guidance to the field offices that are specific to FHWA and the state DOTs.

There are many procedural and policy questions about how to implement the new regulations that should be addressed on a National basis so the field offices can consistently implement them. The following are a few examples:

- How should the 106 process be initiated and by whom?
- How should the local government be consulted with at various stages of the 106 process?
- How should other consulting parties be identified?
- How are tribes identified from outside of the state that may have an interest in a historic resource that is of religious and cultural significance?
- How much archaeology work is required to be done at the draft environmental document stage for a multi-alignment project?

- Does data recovery of an archaeological resource automatically constitute an adverse effect on that resource ? What and when is a 4(f) resource impacted?
- When and how should phased identification and evaluation be done, including archaeology?

The new regulations have been in effect now for approximately eight months and the FHWA (field and HQ) should now have a good understanding where the areas of concern are regarding lack of guidance. Our team recommends that the FHWA formulate a series of Questions and Answers (Q&A) that explain some of the questions people have in implementing the new regulations. FHWA should query the state DOTs and FHWA field offices (Resource Centers and Divisions) to get input from them as to what are the problem areas and coordinate the Q&As with the Advisory Council. This Q&A should be published as a draft so input can be used in finalizing it. The final version should be published no later than December 31, 2000.

Pursue Alternate Procedures -- The new 106 regulations allow federal agencies to develop alternate procedures for processing and the protection of Historic Properties. Unlike programmatic agreement where agreed upon "categories" of projects are exempt from review, alternate procedures allow a federal agency to discharge certain activities to a state agency such as the State Highway Agencies (SHAs). Currently, only HUD is allowed to discharge its responsibilities to a state agency. Proposed Alternate procedures require approval by the Advisory Council on Historic and are then published in the Federal Register for public comment. Such procedures could provide a much more significant role for the SHPO who we believe to be the one of foremost authority for identifying historic properties as well for assessing effects of proposed activities on historic properties. Our team recommends the FHWA Office of Human Environment develop an Alternative Procedure with the ACHP, AASHTO, and the National Conference of SHPOs that allows certain actions to be taken by SHAs. This task should start immediately and could be done by December 31, 2000.

Explore funding the ACHP for FHWA work -- These additional guidance and procedures will need to be developed by FHWA headquarters. The office that would be responsible for this work is the Office of Human Environment. In fact, there is only one person in that office with direct historic preservation responsibilities.

In light of this staffing situation, our team recommends that the FHWA explore funding a position at the ACHP or FHWA HQ for a period of one year (extendable at one year increments). The duties of this person would be to assist FHWA in developing guidance and policy on implementing Section 106, work as an agency resource to answer questions, maintain policy information and provide technical assistance. That person would actually work with the FHWA Office of Human Environment and be assisted to ACHP through an interagency agreement. The estimated cost of this position (including miscellaneous costs) is \$80,000 and should be filled as soon as possible. An alternative could be to assign the ERC person on a rotational assignment to HQ.

Develop programmatic agreements (both nationally and locally) -- Programmatic agreements (PA) can greatly streamline the Section 106 process. The new Section 106 regulations allow certain "programs or category of undertakings" to be exempt from the Section 106 process where the "potential effects are foreseeable and are likely to be minimal". Also, the new regulations allow for programmatic agreements when the effects are similar and repetitive, multi-State or regional. National Programmatic Agreements require approval by the Advisory Council on Historic Preservation and are then published in the Federal Register for public comment. Local Programmatic Agreements also require approval by the Advisory Council on Historic Preservation, but do not go through the Federal Register for public comment.

Our team recommends the FHWA Office of Human Environment:

- Develop a National PA with the ACHP and the National Association of SHPOs that exempts certain programs or categories of undertakings. This task should start immediately and could be done by December 31, 2000.
- Canvas the States to determine what PAs are currently in use and summarize each PA (1 paragraph) and published this on the FHWA website (with PDF copies available for downloading). This would allow those States that are developing their own PA to quickly find what the rest of the country is doing and take the best elements from each. This task could be done by September 30, 2000.
- Develop sample PAs that establishes an automatic "No Historic Properties Affected" for certain types of

projects with certain mitigation. Examples are Transportation Enhancement projects, historic bridges, recreational trails, etc.. This task could be done by September 30, 2000.

Establish qualified 106 personnel at the Eastern Resource Center -- The FHWA should ensure the resource centers are staffed with personnel that have an intimate knowledge of the Section 106 process and have a keen understanding of historic preservation issues as they relate to transportation. We suggest that the ERC staff participate in FHWA headquarter's efforts regarding historic preservation as recommended. Also, we suggest they develop a technical assistance program regarding programmatic agreements (PA) and streamlined procedures. We foresee the ERC staff as being able to provide valuable input to States in developing their own procedures and agreements.

Develop NHI sponsored 106 training course -- Currently only one NHI course on historic and archaeology preservation (NHI-14211) exists. The NHI course handbook states Course 14211 is being "revised for Fall 2000" which leads the team to believe that it is being revised to reflect the new regulations. The team recommends a series of course be developed to provide guidance within FHWA and States on different aspects of the 106 program. For example an mini- 4 hour overview course could be developed for managers and executives. Another course could be developed for sensitivity training concerning Native American issues.

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Action Plan #5: Timely Dispute Resolution

Problem Statement:

The State and Federal Transportation and Resource Agencies often cannot reach agreement at critical decision points/stages in project development, resulting in increased project costs, erosion of public trust, inefficient use of limited staff resources and ultimate delay in implementing needed transportation improvements for the public.

Solution Statement:

Establishing a consistent resolution process whereby disputes are elevated to appropriate higher authority positions within the regional organizational structures of the agencies, with defined time frames for decisions to be rendered and documented, will save money and personnel resources, reduce delays in implementing needed transportation improvements and promote public trust in the process and the involved agencies.

Action/Step(s) Target Date:

Action 1: Add Mass. Highway Dept., VTAOT, MEDOT and FTA representatives to team -- March 7, 2000.

Action 2: Draft Timely Dispute Resolution Process Agreement -- May 1, 2000.

- Team drafts agreement, addressing mechanism for invoking process, timeframes for decisions at each elevation level and formal procedures for documentation of decisions -- May 1, 2000

Action 3: Identify Federal/State/Regional Agencies to be included in timely dispute resolution process -- May 1, 2000.

- For all agencies included in timely dispute resolution process, identify first and second levels of elevation -- May 1, 2000.
- Team drafts letter to agencies, citing examples of issues subject to elevation -- April 1, 2000.
- State Transportation Agencies Environmental Managers confirm State/Regional Agencies participation and elevation levels -- May 1, 2000.
- Federal Highway Administration team representative confirms Federal Agencies' participation and elevation levels -- May 1, 2000.

Action 4: Establish mechanism for invoking the process -- September 1, 2000.

- Establish time frames for decisions at each elevation level -- September 1, 2000.
- Establish formal procedures for documenting decisions -- September 1, 2000.
- Team distributes draft agreement to participating agencies for review -- June 1, 2000.
- State Transportation Agency Environmental Managers/FHWA Division Office representatives host resource agencies meetings in each state to address elements in the process, as outlined in draft agreement -- September 1, 2000.

Action 5: Revise agreement, to reflect input from resource agencies, and circulate for approval -- October 1, 2000.

Action 6: Adopt process when approved by all participating agencies -- November 1, 2000.

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